In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 267

SIX COMPANIES OF CALIFORNIA, a corporation, and HARTFORD ACCIDENT AND INDEMNITY COMPANY, a corporation, FIDELITY AND DEPOSIT COMPANY OF MARYLAND, a corporation, THE AETNA CASUALTY AND SURETY COMPANY, a corporation, INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, a corporation, AMERICAN SURETY COMPANY OF NEW YORK, a corporation, MARYLAND CASUALTY COMPANY, a corporation, UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation, THE FIDELITY AND CASUALTY COMPANY OF NEW YORK, a corporation, GLENS FALLS INDEMNITY COMPANY, a corporation, STANDARD SURETY AND CASUALTY COMPANY OF NEW YORK, a corporation, STANDARD ACCIDENT INSURANCE COMPANY, a corporation, MASSACHUSETTS BONDING AND INSURANCE COMPANY, a corporation, CONTINENTAL CASUALTY COMPANY, a corporation, and NEW AMSTERDAM CASUALTY COMPANY, a corporation,

Petitioners,

vs.

JOINT HIGHWAY DISTRICT NO. 13 OF THE STATE OF CALIFORNIA, a public corporation,

Respondent.

Respondent's Petition for a Rehearing

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Table of Authorities Cited

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Petitioners,

vs.

JOINT HIGHWAY DISTRICT NO. 13 OF THE STATE OF CALIFORNIA, a public corporation,

Respondent.

Respondent's Petition for a Rehearing

To the Honorable the Supreme Court of the United States:

Respondent Joint Highway District No. 13 of the State of California respectfully petitions for a rehearing herein.

Respondent also requests that pending action on this petition that this court order that the issuance of the mandate herein be stayed.

GROUNDS FOR REHEARING

We respectfully contend that this court has misconceived the holding of the California court in *Sinnott v. Schumacher*, 45 Cal. App. 46, 187 Pac. 105. What was said therein concerning liquidated damages after abandonment of a contract was not directed to the point that there could be no recovery of liquidated damages for *delay* after abandonment, in a proper case.

The language therein was directed wholly to the argument of the contractor that the contract provision for liquidated damages for delay was the full measure of damage which could be recovered by the owners for all damage occasioned by a breach of the contract.

Damages for delay may be only one of several items of damage resulting from a breach of a construction contract. As in the *Sinnott* case, increased cost of completion may be a more substantial item of damage than damages for delay. Obviously increased cost is not included within a clause providing for damage for *delay only.*

When the California court said that "the right of the defendants to damages as the result of the plaintiff's breach of said contract could not be *affected or limited* by said provision of the contract for a penalty for delay" the court was answering the broad contention of the contractor that no damages other than liquidated damages

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Note: Unless otherwise stated all emphasis appearing herein is supplied.

for delay could be recovered because of the abandonment by him.

The California court did not decide that because of abandonment, that liquidated damages *for delay* could not be recovered for such delay, in addition to other damage caused by the breach, such as increased cost of completion.

Increased cost of completion was not *within the scope* of liquidated damages for delay, and obviously could not be *"affected or limited by said provision"* fixing damages for delay.

We respectfully submit that in the *Sinnott* case the court did not decide that there could be no recovery of liquidated damages for delay after abandonment. The court there decided that a clause providing for liquidated damages *for delay only* did not preclude an award for damages on a breach, for all of the other items of damage including increased cost of completion and the rental value of the building during the period that completion was delayed because of the breach.

The following considerations demonstrate that the construction we have given to the opinion in the *Sinnott* case is proper, and that the propriety of allowing liquidated damages for delay after abandonment was never in issue in that case.

I.

Liquidated damages *for delay* were never pleaded in the *Sinnott* case and were never in issue in that case. There

was no pleading therein setting forth the necessity for the application of the liquidated damage clause and showing facts that it was impracticable or extremely difficult to fix the actual damage, as is required by California law in order to recover liquidated damages.

It is a cardinal rule of California practice that there can be no recovery for liquidated damages without first a *pleading* and also proof of the difficulty and impracticability of fixing actual damage. This is shown by the case of *Long Beach etc. Dist. v. Dodge,* 135 Cal. 401, 404, 67 Pac. 499, wherein the Supreme Court of California said:

> "The principal question presented is one of pleading. The plaintiff assumed, and, I think, correctly, that the damages stipulated in this contract could not be recovered without evidence that it would be impracticable or extremely difficult to fix the actual damage. As an illustration that such evidence is necessary, suppose the high school during this period occupied a leased building equally as well adapted to the purposes of the school as the one contracted to be erected: the damage sustained by the district would obviously be the rent of the building, and in such case stipulated damages could not control. Upon this subject the Civil Code contains the following provisions:—
>
> 'SEC. 1670. Every contract by which the amount of damage to be paid, or other compensation to be made, for a breach of an obligation, is determined in anticipation thereof, is to that extent void, except as expressly provided in the next section.
>
> 'SEC. 1671. The parties to a contract may agree therein upon an amount which shall be presumed

to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage.'

The first of these sections having declared *all* contracts fixing liquidated damages in advance to be void, except as provided in the next section, it is clearly incumbent upon the party seeking to recover upon such agreement to show by averment and proof that his case is within the exception, for without an allegation bringing his case within the exception the complaint in that regard is insufficient, the presumption being in the absence of such allegation that such agreement is void." (Emphasis is the court's.)

See also *Kelly v. McDonald,* 98 Cal. App. 121, 125, 276 Pac. 404, 406; *Mente & Co. v. Fresno C & W Co.,* 113 Cal. App. 325, 331-3, 298 Pac. 126, 128-9. These cases cite numerous authority showing that this is the uniform California rule.

We have set forth in the Brief of Respondent in Opposition to Petition for Writ of Certiorari (Appendix, page 1) the entire pleading in the *Sinnott* case on damages for delay and also the findings of the court on damages for delay. We also left with the court on oral argument a certified copy of the record in the *Sinnott* case. Appellant has not questioned the correctness of the record and the printed excerpts from the *Sinnott* case. These excerpts from the pleadings printed in our Brief and the record show that never in the *Sinnott* case was there any claim for *liquidated* damages for delay. Therefore liquidated damages for delay were never in issue. They were neither *pleaded nor proved* as required by California law.

When the court made the answer that it did to the contractor's contention that the liquidated damage clause for delay covered *all* damage, the court was not ruling that there could be no recovery for liquidated damages *for delay only* in a proper case, but was holding that the liquidated damage clause for delay *only* in that contract, had no application and did not limit the damages recoverable in the event of abandonment which might be greatly in excess of any damage for delay, and which included other items of damage apart from delay.

II.

The excerpt quoted above from the case of *Long Beach etc. Dist. v. Dodge,* quotes verbatim sections 1670 and 1671 of the Civil Code of California. These show that there can be no liquidated damages for delay, or for any cause except in cases of impracticability of fixing actual damage, and never when the actual damages can be ascertained. In the *Sinnott* case the subject of the contract was a building which had a fixed rental value. The liquidated damage clause for delay would be inapplicable to that case because the actual damage could be readily ascertained. In our Brief in Opposition to Petition for Writ of Certiorari (Appendix, page 1) we have copied paragraph VI of the Findings in the *Sinnott* case. Therein the court found that the reasonable market value of the use and rental of the building was the sum of $880.38 a month for a total of three months' delay, or $2641.14. This ability to fix the actual damages for delay was probably

why liquidated damages were not pleaded, and why such were not in issue in the case, and why the court held that the clause which was *for delay only* did not affect the recovery of general damage.

III.

There is a divided line of authority in the United States as to whether or not liquidated damages for delay apply in the event of abandonment. There was this divided line of authority when the *Sinnott* case was decided. For a holding contra to Mr. Williston (*Williston on Contracts, Rev. Ed.*, Vol. 3, sec. 785, p. 2210) see *School District No. 3 etc. v. U. S. Fidelity and Guaranty Co.*, 96 Kan. 499, 152 Pac. 668, 670, a case decided four years prior to the *Sinnott* decision. Therein it was held that liquidated damages did apply in the event of abandonment. Nevertheless, in the *Sinnott* case the court did not recognize this divided line of authority, nor cite any cases either way, or reason the matter in any way. It merely used the language previously quoted that the damages as the result of plaintiff's breach "could not be affected or limited" by the provision for a penalty for the delay, meaning thereby that the penalty for delay could not be a substitute for damage *other than delay* which sprung from the breach of the contract.

It is reasonable to assume that had the court intended to lay down for the first time in California a new rule of law regarding recovery of liquidated damages *for delay after abandonment*, it would have cited available authority

and stated its reasons for its conclusion. The decision is too inconclusive to justify a reversal. It does not even refer to the previous *Bacigalupi* case, next cited, which appellants argue states the same rule of law.

IV.

The California case of *Bacigalupi v. Phoenix Building Co.*, 14 Cal. App. 632, 638, 112 Pac. 892, supports our view. In the *Bacigalupi* case the owner entered into a contract with the defendant contractor to construct a building for $14,000.00. The Surety Company gave a bond for $3500.00 conditioned upon the faithful performance of the contract. The contractor did not complete the building and the owner brought an action against the contractor and his surety and was awarded $3300.00, the reasonable cost of completion over and above the contract price. There was no claim therein *for damages for delay.* The contractor, however, claimed that the provision in the contract for liquidated damages of $5.00 a day for delay, was the full measure of recovery. The court said (14 Cal. App. 638):

> "Manifestly this clause has relation only to damages resulting *from delay only,* and has no bearing upon the measure of damages for an abandonment of the contract and failure to complete the work at all."

In other words, that it was not a substitute for damage other than damage for delay. The only difference between the *Bacigalupi* case and the *Sinnott* case is that in

the *Bacigalupi* case there was no claim for damages for delay, while in the *Sinnott* case there was no claim for *liquidated* damages for delay, but the claim was for actual damage for delay. Actual damages for delay were awarded in the *Sinnott* case and the actual damage was the only damage *for delay* that was in issue in that case.

See *Southern Pacific Co. v. Globe Indemnity Co.*, 21 F. (2d) 288, for an interpretation of the *Bacigalupi* case and also as to that case, the opinion of the Circuit Court herein (R. 2628).

In our opinion the trial court gave the proper construction of both the *Sinnott* and *Bacigalupi* cases when it said regarding these (R. 136):

> "These cases hold that a plaintiff may sue for actual damages when a defendant has breached his contract, notwithstanding a liquidated damage clause in the agreement. *But this is not to say that a plaintiff, or cross-complainant, may not act upon the liquidated damage provision* in a contract when he seeks damages *for delay* caused by an abandonment."

This interpretation of the trial court is in accord with our position herein as to the correct construction of these two cases.

V.

The record in the *Sinnott* case shows that damages were allowed among others for the following items: $8,000.00, increased cost for completing the work; $2,500.00, attorney's fees; $2,641.14, reasonable value of the rental of the building for three months' delay in completion.

Obviously, the contention of the contractor that the liquidated damage clause for delay was a substitute for all this damage was an unsound argument. Manifestly, it is one thing to hold that the *general damage* which the owner suffers because of the contractor's abandonment of the contract is not limited or affected by a provision for stipulated damages *for delay,* and it is another thing to hold that in the event of abandonment the clause providing for stipulated damages for delay is inapplicable *to damage for delay only.* In the *Sinnott* case the court clearly decided the first point above stated, but we respectfully contend it did not decide the latter. We contend therefore that it is not the law of California that when a contractor abandons his contract, that there then can be no recovery of *liquidated damages for delay.*

VI.

There is also this distinction between the *Sinnott* case and the instant case. The *Sinnott* case dealt with a private contract. The contract in question is a public contract. Respondent District is a special and temporary public corporation. This is stated by the court below (R. 2625), and the nature of the District is shown by a case involving it (*Joint Highway District No. 13 v. Hinman,* 220 Cal. 578, 32 Pac. (2d) 144).

That the District in its corporate capacity suffered substantial actual damage from delay, is recognized in the opinion of the court below, wherein the court notes an item of $272.89 a day, the actual per diem cost to the District of operating overhead, during the period of delay

(R. 2625). The District also suffered further damage in its corporate capacity other than this per diem expense (Finding XXXV, R. 203-4).

In addition to the damage for delay sustained by the District in its corporate capacity there was other material damage suffered by the inhabitants of the District because of the necessity to use existing and obsolete routes instead of the new improvement. That this damage is exceedingly great is recognized in the opinion of the Circuit Court (R. 2625), also by the finding of the trial court (R. 202-3).

The authorities regard public corporations as in a peculiar class with respect to damage suffered by delay. In the case of *Parker etc. Co. v. City of Chicago*, 267 Ill. 136, 107 N. E. 872, 1916C Ann. Cas. 337, the court recognizes that in many cases if liquidated damages for delay may not be recovered for a public improvement, the public, though injured, would get no damages at all, saying (Ann. Cas. 1916C 339):

> "The city, in its corporate capacity, would suffer no damages for the failure to complete the work, but the citizens in whose behalf the contract was made would suffer damages which it would be practically impossible to prove."

See, also, a well considered note in Annotated Cases 1912C, page 1028 to the effect that the principle of liquidated damages applies with special force to contracts for public works. See also the opinion and supporting cases in the Circuit Court (R. 2626). Such contracts are in a special class with regard to liquidated damages for delay.

We submit that a real distinction between the *Sinnott* case and the instant case is that the *Sinnott* case dealt

with a private and not a public contract. A private contract usually deals with a structure having a definite rental value and actual damages for delay are readily ascertainable. A public contract usually deals with the converse situation. The *Sinnott* case should be interpreted, if applying at all, as applying to the particular contract involved in that case (a private contract) and not as laying down a rule of law applicable to an entirely different class of contract.

We respectfully request that this petition for a rehearing be granted.

We further respectfully ask that, pending action on this petition, this court order that the issuance of the mandate herein be stayed.

Dated: Oakland, California, December 17, 1940.

Respectfully submitted,

ARCHIBALD B. TINNING,
T. P. WITTSCHEN,
Attorneys for Respondent.

Certificate of Counsel

We certify that the above petition for rehearing is presented in good faith and not for delay.

ARCHIBALD B. TINNING,
T. P. WITTSCHEN,
Attorneys for Respondent.

P 1.

SUPREME COURT OF THE UNITED STATES.

No. 267.—October Term, 1940.

Six Companies of California, Hartford Accident and Indemnity Company, et al., *vs.* Joint Highway District No. 13 of the State of California.	On Writ of Certiorari to the United States Circuit Court of Appeals for the Ninth Circuit.

[December 9, 1940.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

Six Companies of California, a contractor, brought this suit against respondent, Joint Highway District No. 13, to recover the reasonable value of materials and labor furnished under a contract. The contractor had undertaken to rescind for alleged breach by respondent and had stopped work. Respondent answered, alleging wrongful abandonment of the contract and by cross-complaint sought damages against the contractor and its sureties.

There was a clause in the contract for liquidated damages in the amount of $500 a day in case of delay in completion.[1] The District Court found against the contractor and its sureties and on the cross-complaint awarded damages which included $142,000 as liquidated damages for delay. The Circuit Court of Appeals affirmed the judgment. 110 F. (2d) 620.

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[1] That clause provided:

"(d) Damages for Delay.—The Parties hereto expressly stipulate and agree that time is the essence of this contract. In case the work is not completed within the time specified in the contract or within such extensions of the contract time as may be allowed as herein provided, it is distinctly understood and agreed that the contractor shall pay the District as agreed and liquidated damages and not as a penalty five hundred dollars ($500 00) for each and every working day which may elapse between the limiting date as herein provided and the date of actual completion of the work, said sum being specifically agreed upon as a measure of the damage, to the District by reason of delay in the completion of the work; it being expressly stipulated and agreed that it would be impracticable to estimate and ascertain the actual damages sustained by the District under such circumstances, and the Contractor agrees and consents that the amount of such liquidated damages so fixed, shall be deducted and retained by the District from any money then due, or thereafter to become due, the Contractor".

Petitioners contended that under the law of California the clause providing for liquidated damages did not apply to delay which occurred after the abandonment of the work by the contractor. This contention was overruled. The Circuit Court of Appeals expressly recognized that its decision in that respect was contrary to the decision of the District Court of Appeal in California in the case of *Sinnott* v. *Schumacher*, 45 Cal. App. 46. But the Circuit Court of Appeals thought that decision wrong and refused to follow it. We granted certiorari limited to the question whether there was error in that ruling. October 14, 1940.

In *Sinnott* v. *Schumacher, supra*, the suit was brought to recover the value of labor and materials furnished under a building contract. After part performance the contractor gave notice of rescission and abandoned work because of failure to receive the first installment of the agreed payment. Defendants denied that the installment was due and filed a cross-complaint against the contractor and his surety asking damages because of the abandonment of the work. The trial court found against the plaintiff on his complaint and in favor of the defendants on their cross-complaint, and entered judgment for damages. The District Court of Appeal affirmed the judgment. The Supreme Court of the State denied a petition for hearing in that court.

On the appeal to the District Court of Appeal, the plaintiff-appellant contended that the trial court erred as to the amount of the damages awarded, basing his contention upon the clause in the contract which provided for liquidated damages in a stipulated amount per day in case of delay in completion.[2] The District Court of Appeal held that the clause had no application to a case where the

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[2] The clause for liquidated damages in the contract in the Sinnott case was as follows:

"Should the Contractor fail to complete this contract and the work provided for within the time set for completion as aforesaid, due allowance being made for the contingencies provided for herein, he shall then become liable to the Owner for all loss and damages which the Owner may suffer on account thereof, in the sum of Ten Dollars per day, which the Contractor hereby agrees to deduct from his contract price, for each day that the work shall remain unfinished beyond such time for completion, and the Owner agrees to pay to the Contractor a bonus of Ten Dollars ($10) for each day that the work may be completed before the time aforesaid for the completion.

"The agreement in this paragraph made for damages is made as herein set forth for the reason that the actual damage which will be sustained by the Owner

contract had been abandoned without sufficient cause. The court said:

"As to the appellants' contention that the court was in error in its finding and conclusion as to the amount of damages sustained by the defendants and cross-complainants by reason of the plaintiff's unjustified abandonment of work upon said building, and his failure, neglect, and refusal to complete the same, it may be stated that this contention is based upon the clause in the contract which relates to the matter of delay in the time of completion of said building and which purports to fix a penalty of fifty dollars per day for such delay; but this provision of the contract has no application to a condition wherein the contractor is shown to have abandoned his contract without sufficient cause, in which case the right of the defendants to damages as a result of the plaintiff's breach of said contract could not be affected or limited by said provision of the contract for a penalty for delay in the completion of the structure beyond the stipulated time for such completion".[3]

Respondent urges that what was said by the District Court of Appeal in the *Sinnott* case with respect to the liquidated damage clause was a mere dictum. We do not so regard it. This part of the opinion of the court was its answer to the appellants' insistence that the judgment on appeal was erroneous because the liquidated damage clause had been disregarded and damages had been awarded in excess of the amount for which the contract provided. What the court said as to this was a statement of the ground of its decision. It was a statement of the law of California as applied to the facts before the court. It is said that there is a difference between the two cases. That difference appears to be that in the instant case the owner is seeking to apply the liquidated damage clause in order to recover from the contractor, while in the *Sinnott* case the contractor was seeking to limit the damage recover-

by reason of the Contractor's breach of the covenant to complete this contract within the time stated is from the nature of the case impracticable and extremely difficult to fix; and one of the considerations moving the Owner to enter into this contract with the Contractor is the agreement of the Contractor to complete his said contract within the time herein stated and the liquidated damages herein above stated for his failure to do so".

The plaintiff's contention under this clause was that the delay in completion was not more than five days the damage for which under the contract would amount to $50.

[3] Compare Bacigalupi v. Phoenix Building Co., 14 Cal. App. 632, 639. See Williston on Contracts, Rev. Ed., Vol. 3, Sec. 785, pp. 2210, 2211.

able against him to the amount agreed upon. But, so far as the question concerns the applicability of the liquidated damage clause, the difference would not seem to be material, as by the terms of the clause in each case it appears to be intended to bind both parties when applicable. The ruling as to the law of California as applied by the state court was that the stipulation in the contract as to the amount of damages in case of delay in completion was not applicable to delay after the contractor had abandoned the work. As the Circuit Court of Appeals said, that decision "is adverse to ours".

The decision in the *Sinnott* case was made in 1919. We have not been referred to any decision of the Supreme Court of California to the contrary. We thus have an announcement of the state law by an intermediate appellate court in California in a ruling which apparently has not been disapproved, and there is no convincing evidence that the law of the State is otherwise. We have fully discussed the principle involved in the cases of *West* v. *American Telephone and Telegraph Co.*, Nos. 44 and 45, and *Fidelity Union Trust Co.* v. *Field*, No. 32, decided this day, and further amplification is unnecessary. See, also, *Rindge Co.* v. *Los Angeles*, 262 U. S. 700, 708; *Tipton* v. *Atchison, Topeka & Santa Fe Rwy. Co.*, 298 U. S. 141, 151. The Circuit Court of Appeals should have followed the decision of the state court in *Sinnott* v. *Schumacher* with respect to the inapplicability of the liquidated damage clause in the event of the abandonment of work under the contract, and its judgment to the contrary is reversed. The cause is remanded for further proceedings in conformity with this opinion.

It is so ordered.

A true copy.

Test:

Clerk, Supreme Court, U. S.